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PORTIA BASS,

Plaintiff-Appellant,

V.

E. I. DUPONT DE NEMOURS& COMPANY,

Defendant-Appellee.

No. 01—1073

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

2002 U.S. App. LEXIS 474; 28 Fed. Appx. 201

October 30, 2001, Argued
January 10, 2002, Decided

NOTICE:
[*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY:
Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. Jackson L. Kiser, Senior District Judge. (CA-OO--64-5).

DISPOSITION:
Affirmed in part, and appeal dismissed in part.

COUNSEL:
ARGUED: Tamika Chelsea Harris, Waynesboro, Virginia, for Appellant.

James Moss Johnson, Jr., MCGUIRE WOODS, L.L.P., Charlottesville, Virginia, for Appellee.

ON BRIEF: H. Craig Wood, MCGUIRE WOODS, L.L.P., Charlottesville, Virginia, for Appellee.

JUDGES:
Before WILKINS, LUTTIG, and GREGORY, Circuit Judges.

OPINION:

PER CURIAM:

This case involves numerous claims by the appellant, Portia Bass, against her former employer, E.I. du Pont de Nemours & Co. (DuPont). The district court granted two separate motions to dismiss, and Bass has appealed both. We dismiss a portion of the appeal for lack of appellate jurisdiction, and affirm in all other respects.

I.

Because of the procedural posture of the case, we assume the veracity of the following allegations. Bass is a 50 year-old African—American female who worked for DuPont for 15 years. She was DuPont's **[*2]** Global Lycra Toxic Substances Control Act (TSCA) Coordinator. Bass was demoted to a lesser position, and replaced in her former position by Nancy Deputy, a white woman under forty years of age. Though inexperienced and unqualified for the job, Deputy was given a superior

compensation package. Bass complained of the demotion in a letter to management, which was disseminated to various managers. Bass was ridiculed by these managers because of the letter. Another manager, Susan Dahl, wrote a defamatory letter regarding Bass that was circulated to twelve corporate executives.

At some point after the demotion, Bass was ordered to resume her previous duties as TSCA Coordinator, but with the restriction that she was to have no contact with Nancy Deputy, who would also retain the position. Bass was also subjected to additional verbal abuse by co—employees, which she reported to two DuPont Vice Presidents.

As part of her job, Bass was required to ensure the accuracy of certain health and safety data. Because of the restrictions that were placed on her upon resumption of TSCA duties, Bass did not have access to the information necessary to make accurate assessments of the data.

Bass alleges **[*3]** that she was consistently paid less than similarly situated white men. On May 10, 1999, Bass filed a discrimination complaint with the EEOC. On June 16, 1999, Bass was fired. This lawsuit ensued.

Bass's Complaint and First Amended Complaint alleged various nonspecific causes of action which the district court found could be broadly grouped as follows: (1)Title VII discrimination, retaliation, and hostile work environment, *42 U.S.C. § 2000e;* (2) Equal Pay Act violations, *29 U.S.C. § 206(d);* (3) a state law defamation claim; (4) a state law wrongful discharge claim, Va. Code § 40.1—51.2:1; (5) a state law spoliation of evidence claim; and (6) a state law tortious interference with due process claim. DuPont moved for dismissal of the wrongful discharge, defamation, spoliation of evidence, and tortious interference

claims pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure. DuPont also moved for summary judgment on the Equal Pay Act claim Pursuant to Rule 56 of the Federal Rules of Civil Procedure. In an order dated December 15, 2000, the district court granted DuPont's motion to dismiss and denied DuPont's motion for summary **[*4]** judgment.

On January 19, 2001, Bass filed her Second Amended complaint, realleging the remaining claims and adding several new claims. The complaint contained eleven counts: Count I—-Title VII race discrimination; Count Il-—age discrimination in violation of the Age Discrimination in Employment Act; Count Ill--Title VII sex discrimination; Count IV—-wage discrimination in violation of the Equal Pay Act; Count V-—Title VII retaliation; Count VI--Title VII hostile environment; Count VII--ADEA hostile environment; Count VIII-conspiracy in violation of *42 U.S.C. § 1985(3);* Count IX--a *Bivens* claim; Count X—-common law conspiracy to hinder pursuit of discrimination claim; and Count XI-—common law conspiracy to destroy evidence. On March 19, 2001, the district court granted DuPont's motion to dismiss Counts VI through XI.

On March 19, 2001, the district court also granted Bass's motion for entry of judgment on the claims dismissed by the December 15 order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Bass did not move for a similar entry of judgment on the claims dismissed by the March 19 order.

Bass has appealed both the December 15 order **[*5]** and the March 19 order.

II.

We must address a preliminary issue before reaching the merits of the appeal. DuPont has filed a motion to dismiss the

appeal from the district court's March 19 order for lack of appellate jurisdiction. We agree that we do not have jurisdiction over that portion of the appeal.

Unlike the appeal from the December 15 order, entry of judgment has not been made on the claims dismissed by the March 19 order. Accordingly, the district court's decision as to these claims lacks finality under *28 U.S.C. § 1291.* See *also* Fed. H. Civ. P. 54(b).

Bass argues that the March 19 decision is appealable under two exceptions to the finality requirement: pendent appellate jurisdiction and the *Cohen* collateral order doctrine. Neither of these exceptions applies.

First, Bass argues that we have discretion to exercise pendent appellate jurisdiction over otherwise non-appealable orders that "are reasonably related to the appealable order when that review will advance the litigation or avoid further appeals." *Hoechst Diafoil* Co. v. Nan 1'a Plastics Corp., 174 F.3d 411, 416 (4th Cir. 1999) . In *Hoechst,* however, we noted **[*6]** that the viability of the doctrine of pendent appellate jurisdiction had been cast into some doubt by the Supreme Court's decision in *Swint v. Chambers County Comm 'n, 514 U.S. 35, 131 .L. Ed. 2d 60, 115 S.* Ct. *1203 (1995). See Hoechst, 174 F.3d at 416.*

In *Swint,* the Supreme Court, while not definitively settling whether the exercise of pendent appellate jurisdiction is ever appropriate, sharply limited its potential reach. The Court left open the possibility that pendent appellate jurisdiction might be appropriate if a court of appeals with jurisdiction over one ruling, conjunctively reviews a related ruling that is "inextricably intertwined" with the appealable order, or if review of the

otherwise non-appealable order is "necessary to ensure meaningful review" of the appealable order. *Swint, 514 U.S.* at *51.* See *also Jenkins v. Medford, 119 F.3d 1156, 1159 (4th Cir. 1997)* (en banc); *Taylor v. Waters, 81 F.3d 429, 437 (4th Cir. 1996)* (citing *Swint)* . Bass's appeal does not meet this test. While the claims dismissed by the two orders do arise out of the same set of alleged facts, the claims resolved [*7] by the December 15 order are easily separated from the claims resolved by the March 19 order. The claims involve different legal issues. *Swint, 514 U.S.* at *51.* Indeed, it appears Bass argued as much in seeking partial entry of judgment pursuant to Rule 54(b). See Appellee's Motion to Dismiss the Appeal of Counts VI-XI for Lack of Jurisdiction, Ex. A.

Second, the *Cohen* collateral order doctrine does not provide a basis for jurisdiction over the March 19 order. *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949). Cohen* authorizes jurisdiction only over "decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint, 514 U.S.* at 42.

Bass's appeal fails to qualify. *First,* under Rule 54(b), the March 19 order remains subject to revision at any time before entry of judgment, and is therefore not conclusive. *Second,* the issues resolved by the March 19 order are not separate from the merits, they are the merits. *Third,* the March [*8] 19 order is clearly reviewable on appeal. DuPont's motion to dismiss Bass's appeal from the district court's March 19 order is therefore granted.

III.

Remaining before us is the appeal from the December 15 order. We review a Rule 12(b) (6) dismissal de *novo. Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999).* "[A] Rule 12(b) (6) motion should only be granted if, after accepting all well—pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards, 178 F.3d* at 244.

A.

The first claim dismissed by the district court was Bass's wrongful discharge claim. Bass asserts that she has stated a cause of action under Va. Code § 40.1—51.2:1, which provides:

No person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this Title for themselves or others.

[*9]

Bass's claim fails, however, because she has not exhausted her administrative remedies, as required by Virginia law. Va. Code § 40.1—51.2:2 provides a remedy for violations of Va. Code 51.2:1, stating:

Any employee who believes that she has been discharged or otherwise discriminated against by any person in violation of § 40.1-51.2:1 may, within thirty days after such violation occurs, file a complaint with the Commissioner alleging such discharge or discrimination. Upon receipt of such complaint, the

Commissioner shall cause such investigation to be made as he deems appropriate

(B) Should the Commissioner, based on the results of his investigation of the complaint, refuse to issue a charge against the person that allegedly discriminated against the employee, the employee may bring action in a circuit court having jurisdiction over the person allegedly discriminating against the employee, for appropriate relief.

Under Virginia law, "[when] a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise." *School Board v. Ciannoutsos, 238 Va. 144, 147, 380 S.E.2d 647, 649 (1989);* **[*10]** *see also Vansant & Gunsler, Inc. v. Washington, 245 Va. 356, 360, 429 S.E.2d 31, 33 (1993)* (same). *See Judy v. Nat'l Fruit Product Co., Inc., 40 Va. Cir. 244, 245* (City of Winchester 1996) (holding that Va. Code § 40.1—51.2:2 provides an exclusive remedy for violations based on Va. Code § 40.1—51.2:1). Accordingly, Bass must satisfy the requirements of Va. Code § 40.1—51.2:2 before initiating a lawsuit. Because she has not done so, her claim was appropriately dismissed.

B.

The district court also dismissed Bass's defamation claim. As the district court held, this claim is barred by the applicable statute of limitations. The limitations period for defamation in Virginia is one year. Va. Code § 8.01-247.1. The defamatory letter was published on August 10, 1998; this lawsuit was filed on August 7, 2000, almost a full year after the limitations period had run. Bass seeks to avoid the consequences of the statutory limitations period by arguing that we should apply a discovery rule. The Virginia General Assembly has declined to adopt a

discovery rule in defamation actions. Va. Code § 8.01-230 provides that a "right of action shall be deemed to accrue [*11] end the prescribed limitation period shall begin to run from the date the injury is sustained . . . and not when the resulting damage is discovered." The statute then enumerates specific exceptions to the accrual rule. The defamation statute of limitations is not among the listed exceptions. See Jordan v. Shands, 255 *Va. 494, 498, 500 S.E.2d 215 (1998)* ("Any cause of action that the plaintiff may have had for defamation against any of the defendants accrued on . . . the date she alleges . . . that the defamatory acts occurred. ")

C.

The third claim dismissed by the district court was Bass's spoliation of evidence claim. The district court correctly held that Virginia does not recognize a tort based on spoliation of evidence. See *Austin v. Consolidated Coal Co., 256 Va. 78, 82, 501 S.E.2d 161 (1998)* (declining to recognize the tort in case of the employer's spoliation of evidence important to an employee's suit against third parties) . In *Austin,* the Virginia Supreme Court did not specifically address whether Virginia would recognize the tort in the context of an employer's spoliating evidence of an employee's claim against the employer itself. [*12] As the district court recognized, however, there is even less reason to permit the tort in such a context. When the spoliator is the potential defendant in the case for which evidence was destroyed, the courts typically have ample alternate remedies in the form of fines, costs, adverse jury instructions, evidentiary presumptions, and default. See, e.g., Va. Sup. Ct. H. 4:12; Fed. H. Civ. P. 37. We think that Virginia would not recognize the tort of spoliation of evidence in the circumstances presented by this case.

D.

The fourth and final claim dismissed by the district court was Bass's claim that DuPont tortiously interfered with her due process rights during the EEOC investigation. This claim fails for at least two reasons. *First,* claims of tortious interference in Virginia have been limited to contractual settings. *Chaves v. Johnson, 230 Va. 112, 120, 335 S.E.2d 97 (1985);* see *also Economopoulos v. Kolaitis, 259 Va. 806, 815, 528 S.E.2d 714 (2000)* (finding no claim for tortious interference with inheritance expectancy); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., 65 F.3d 1113, 1121 (4th Cir. 1995)* **[*13]** (no claim under Virginia law for tortious interference with an irrevocable license); *Douglas v. Lancaster Community College, 990 F. Supp. 447, 467 (W.D. Va. 1997)* (no claim under Virginia law for tortious interference by employee against employer with decisions in the employment relationship)
Second, no rights of Bass's have been interfered with because "due process considerations do not attach to the EEOC investigative process." Georator Corp.v.EEOC, 592 F.2d 765, 768 (4th Cir. 1979).

IV.

We therefore conclude that the district court's December 15 order should be affirmed, and we dismiss the appeal from the March 19 order.

DISMISSED IN PART AND AFFIRMED IN PART

CLERKS's OFFICE U.S. DISTRICT COURT
AT HARRISONBURG VA
FILEDDECEMBER 15,2000
MORGAN E. SCOTT JR., CLERK

ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

PORTIA BASS,
Plaintiff, Case No. 5:00CV00064

V. **MEMORANDUM OPINION**

E. I. DU PONT DE NEMOURS & CO.,
Defendant.

By: Jackson L. Kiser
Senior United States District Judge

The underlying action is brought by Portia Bass, an experienced chemist working for E.I. Dupont De Nemours & Company ("Dupont") in its Lycra research division. A fifty year-old black female who was employed by Dupont for fifteen years, Bass was Dupont's Global Lycra Toxic Substances Control Act Coordinator. In this position, Bass was responsible for Dupont's compliance with various health and safety regulatory frameworks in the United States and abroad.

Bass was replaced in her employment by Nancy Deputy. Deputy is a woman, under forty years of age. Bass asserts that, despite the fact that Deputy is an inexperienced biologist who is

unqualified for the position, Deputy received a higher compensation package than did Bass. Meanwhile, Bass was demoted to another position. Bass reported this turn of events to various individuals within the organization, all to no avail. In fact, Bass alleges that Susan Dahl, a Dupont employee, circulated a defamatory letter to twelve senior managers regarding Bass.

On May 10, 1999, Bass filed a charge of discrimination with the EEOC. She was then removed from all leadership roles at the company and was prevented from attending a training course. On June 16,1999, Bass was fired. On August 7, 2000, Plaintiff brought this suit. Although the specific counts are difficult to discern from either the Complaint or the Amended Complaint, the Court concurs with Defendant in isolating six distinct theories for recovery: (1) Title VII discrimination and retaliation, 42 U.S.C.§ 2000e; (2) Equal Pay Act violations, 29 U.S.C. §206(d); (3) a state law defamation claim; (4) U.S.C.§ 2000e; (2) Equal Pay Act violations, 29 U.S.C. §§206(d); (3) a state law defamation claim; (4) a state law wrongful discharge ("Bowman") claim, Va. Code § 40.1-51.2:1; (5) state law spoliation of evidence claim; and (6) state law interference with due process and/or "EEOC duty" claims.

Defendant Dupont filed a Motion to Dismiss the counts relating to the Bowman claim, defamation, spoliation, and tortious interference. Defendant also filed a Motion for Summary Judgment on the Equal Pay Act claim. For the reasons that follow, I grant Defendant's Motion to Dismiss as to all four claims enumerated and deny Defendant's Motion for Summary Judgment on the Equal Pay Act claim.

Wrongful Discharge (Bowman) Claim

Bass' wrongful discharge claim asserts that Plaintiff was

"discriminated against, retaliated against and wrongly terminated...in violation of the Safety and Health Codes of Virginia - Va.Code § 40.1-51.2:1." Complaint ¶42.

Dupont asserts that Bass' state-law wrongful discharge claim fails because she is not a member of the class that the statute was intended to protect and because she failed to exhaust Virginia's remedial scheme for wrongful discharge. Dupont points out that § 40.1-51.2:1 was clearly only meant to protect employees who report health and safety violations from adverse job actions by the employer. Yet, even though Bass now attempts to characterize her actions as a health and safety complaint, she never raised such issues with Dupont or the Commissioner. She never filed a safety or health complaint to anyone. As a result, her discharge cannot, as a matter of law, fall under the ambit of this statute.

Because both the Complaint and Amended Complaint fail to make out a prima facie case on the wrongful termination claim, I grant Defendant's Motion to Dismiss that count.

Defamation Claim

Bass' defamation claim fails due to the statute of limitations. The alleged date of defamation occurred on August 10, 1998, nearly two years before this suit was filed. The statute of limitations for defamation is one year. Va. Code § 8.01-147.1. As a result, I find that Bass' defamation claim is time-barred. Although Plaintiff claims that her Title VII filing tolled the defamation statute of limitations, the caselaw indicates that a filing with the EEOC under Title VII does not toll an independent state action. ***Bowerman v. Industrial Towel Supply, Inc.,*** 1996 LEXIS 4662, 29-3 1 (W.D.Va. 1996) (citing *Arnold*

v. Un ited States, 816 F.2d 1306, 1312-13(9th Cir. 1987)). Indeed, Plaintiff could have always brought a suit within the limitations period in state court on another of her claims, and later amended that complaint to include the defamation charge. Similarly, she could have filed the Equal Pay Act claim in federal court, and amended that complaint to include the Title VII and defamation claims. In essence, the fact that one is pursuing a Title VII claim does not arbitrarily extend the limitations period on all other causes of action arising from the same events. Thus, I find her defamation action to be time-barred.

Moreover, Plaintiff has other significant problems with her defamation claim. First, Plaintiff appears to be suing the wrong party: the author of the defamatory letter should be the target, not Dupont itself. Indeed, Dupont never publishes the letter to anyone beyond itself. Second, Virginia's intracorporate immunity doctrine seems to bar Plaintiff from recovery for defamation. Virginia courts have held that there is no defamation when the action occurs solely within the confines of a business organization. *Lana v. Regelson,* 39 Va. Cir. 536 (Richmond 1996); *Thalhimer Bros. v. Shaw,* 156 Va. 863, 868 (1931). Since the matter occurred solely within the corporate veil, Plaintiffs claim is barred.

Overall, the defamation action seems quite problematic on many fronts. As such, I grant Defendant's Motion to Dismiss the defamation claim.

Spoliation Claim

Bass' spoliation claim fails simply because the claim is insufficient to yield recovery under Virginia law. Simply stated, Virginia does not recognize spoliation of evidence as an

independent tort action. *See Austin v. Consolidated Coal Co.,* 256 Va. 78, 82 (discussing state that recognize spoliation as a tort and expressly refusing to recognize the tort when employer spoliated evidence important to employee's suit against third party). Indeed, courts can always impose other sanctions on spoliating employers, including fines, costs, adverse jury instructions, evidentiary presumptions, or default judgment. *Crown Life Ins. Co. v. Craig,* 995 F.2d 1376 (7th Cir. 1993). Thus, I find there to be no compelling reason to create a new tort of spoliation in this case.

Even were the Court does accept Plaintiffs application of spoliation to this case, the claim would fail to produce the prima facie case as a matter of law. In states that have allowed the tort of spoliation, courts have required "willful disruption of evidence by the defendant designed to disrupt the plaintiffs case." *Austin,* 256 Va. at 82. In this matter, Plaintiff has not demonstrated any ability to prove willfulness in spoliation by Defendant Dupont. As such, the spoliation claim fails as a matter of law, were it to be accepted by the Court in the first place.

Tortious Interference Claim

Bass' tortious interference claim fails because Virginia law allows such claims only in contractual settings. Virginia courts have allowed such claims as applied to contracts. *Chaves v. Johnson,* 230 Va. 112, 120 (1985). Yet, numerous cases exist where the courts have refused to extend tortious interference to other areas of law. *Economopoulos v. Kolaitis,* 259 Va. 806, 815 (2000) (dealing with inheritance expectancy); Multi-Channel TV Cable Co. v. CharlottesvilleQuality Cable Corp., 65 F.3d 1113, 1121 (4th Cir. *1995)* (dealing with irrevocable licenses); *Douglas v. Lancaster Comm. Coil.,* 990 F. Supp. 447,467 (1997)

(regarding decisions in employer-employee relationship). Overall, it seems fair to say that Virginia courts have refused to venture much beyond contractual settings in allowing claims for tortious interference.

Beyond this harrowing legal landscape for Bass, her tortious interference claim also has two serious factual defects. First, Bass was an at-will employee of a private employer, giving her no due process rights in her business relationship with Dupont that would enable her to bring a claim for tortious interference. Second, Plaintiff never asserts the breach of a legal obligation by Dupont to her. Although Dupont may have tortiously interfered in the context of the "EEOC's duty owed to Plaintiff," Complaint ¶ 33, Bass cannot sue a defendant for the damage done by the breach of duty by a third-party. As a result, neither the termination of Bass nor Dupont's interaction with the EEOC can be said to constitute tortious interference.

An independent cause of action for tortious interference does not exist for this type of claim in Virginia. Even if such a cause of action were available to Plaintiff, her pleadings' factual defects would bar recovery in any event. As such, I grant Defendant's Motion to Dismiss the tortious interference claim.[1]

---

[1]Although Plaintiff advanced a theory of conspiracy between Dupont and the EEOC in oral argument, no such allegations are crystallized in either the Complaint or Amended Complaint. As a result, such a theory is not properly before this Court, nonetheless on this Motion.

Equal Pay Act Claim

Defendant has moved for summary judgment on the claim brought under the Equal Pay Act, 29 U.S.C. § 206(d)(1). Summary judgment is appropriate where no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of a material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248. In making this determination, "the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party." *Shaw v. Stroud,* 13 F.3d 791, 798 (4th Cir. 1994) (citations omitted), *cert. denied,* 513 U.S. 813 (1994); *Felty v. Graves-Humphreys Co.,* 818 F.2d 1126, 1129 (4th Cir. 1987). Nevertheless, where the record taken as a whole cannot lead a rational trier of fact to find for the nonmoving party, then no genuine issue exists for trial and summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

Dupont contends that Plaintiff can only succeed on an Equal Pay Act claim if the comparators work at the same facility. EEOC regulations for the Equal Pay Act indicate state that the statute's "well settled meaning" for the word "establishment" was "a distinct physical place of business rather than [] and entire business or 'enterprise.'" 29 C.F.R. §1620.9. In this case, Dupont submits evidence that none of comparators worked at the same facility as did Bass; only one of them ever worked in the Commonwealth of Virginia. As a result, Dupont claims that Bass fails to make out a prima facie case under the Equal Pay Act.

However, Plaintiff has submitted her own affidavit that appears to bring her Equal Pay Act claim under an "unusual

circumstances" exception to the single establishment requirement. *Id.* Bass offers evidence that a central administrative unit hired, set wages, and assigned locations for both her and her comparators. Both the daily duties and working conditions for Plaintiff and her proposed comparators were virtually identical, according to the affidavit. In fact, Bass asserts that both she and her comparators interchanged work locations. Given the procedural posture of this Motion, I accept this evidence as true.

In this light, then, Plaintiff does state an actionable claim under the Equal Pay Act. At the very least, a genuine issue of material fact exists for a fact finder to resolve. As such, the claim survives summary judgment, and I deny Defendant's Motion.

Conclusion

For the foregoing reasons, I grant Defendant's Motion to Dismiss the Wrongful Discharge Claim, defamation claim, spoliation claim, and tortious interference claim. I deny Defendant's Motion for Summary Judgment on the Equal Pay Act claim.

12/15/2000
/s/ Jackson L. Kiser
Unites States District Judge

A true copy, TEST:
Morgan E. Scott, Jr. Clerk

CLERKS's OFFICE U.S. DISTRICT COURT
AT HARRISONBURG VA
FILEDDECEMBER 15,2000
MORGAN E. SCOTT JR., CLERK

ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

PORTIA BASS,
Plaintiff, Case No. 5:00CV00064

V. **ORDER**

E. I. DU PONT DE NEMOURS & CO.,
Defendant.

By: Jackson L. Kiser
Senior United States District Judge

Before this Court is Defendant's Motion to Dismiss several of the counts in Plaintiffs Amended Complaint and Defendant's Motion for Summary Judgment on one count.

Although the format of the Amended Complaint renders difficult the delineation of specific counts, the Court concurs with Defendant's assessment of specific counts alleged. As a result, this Order rules on Defendant's Motion to Dismiss Plaintiffs claim for relief on the grounds of (1) wrongful discharge, Va. Code § 40.1-51.2:1; (2) defamation; (3) spoliation; and (4) tortious interference. In addition, this Order rules on

Defendant's Motion for Summary Judgment on Plaintiffs claim under the Equal Pay Act, 29 U.S.C. § 206(d)(1).

For the reasons stated in the accompanying Memorandum Opinion, Defendant's Motion to Dismiss the four counts enumerated above is **GRANTED** and Defendant's Motion for Summary Judgment is **DENIED**.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

Entered this 15TH day of December, 2000.

/s/ Jackson L. Kiser
Unites States District Judge

A true copy, TEST:
Morgan E. Scott, Jr. Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

F ILED

February 5, 2002

No. 01-1073

CA-00-64-5

PORTIA BASS

Plaintiff - Appellant

V.

E.I. DUPONT DE NEMOURS & COMPANY

Defendant -Appellee

On Petition for Rehearing En Banc

The appellant's petition for rehearing en bane was submitted to this Court. As no member of this Court requested a poll on the

petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en bane is denied.

For the Court,
/s/ Patricia S. Connor
CLERK

U.S. Const. Amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the or same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature

thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to

enforce, by appropriate legislation, the provisions of this article.

Fed. R. Civ. P. 15(c). Relation Back of Amendments

An amendment relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statue of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the same conduct, transaction, occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provisions (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but ro a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing address of process to the United States Attorney, or United States Attorney's designee or the Attorney General of the United States, or an agency of officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A)

and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

42 U.S.C. 2000e-5(e)- (f)(1) Enforcement provisions

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title [42 USCS §§2000e et seq.] (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority

system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the

Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Va. Code Ann. § 2.2-2639. Causes of action not created

A. Nothing in this article creates, nor shall it be construed to create, an independent or private cause of action to enforce its provisions, except as specifically provided in subsections B and C.

B. No employer employing more than five but less than fifteen persons shall discharge any such employee on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, or of age if the employee is forty years or older.

C. The employee may bring an action in a general district or circuit court having jurisdiction over the employer who allegedly discharged the employee in violation of this section. Any such action shall be brought within 180 days from the date of the discharge. The court may award up to twelve months' back pay with interest at the judgment rate as provided in § *6.1-330.54*. However, if the court finds that either party engaged in tactics to delay resolution of the complaint, it may (i) diminish the award or (ii) award back pay to the date of judgment without regard to the twelve-month limitation.

In any case where the employee prevails, the court shall award attorney's fees from the amount recovered, not to exceed twenty-five percent of the back pay awarded. The court shall not award other damages, compensatory or punitive, nor shall it order reinstatement of the employee.

D. Causes of action based upon the public policies reflected in this article shall be exclusively limited to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances. Nothing in this section or §2.2-3 900 shall be deemed to alter, supersede, or otherwise modify the authority of the Council or of any local human rights or human relations commissions established pursuant to §§15.2-965 or 15.2-853 or subject to the provisions of § 2.2-2638.

Va. Code Ann. § 8.01-230. Accrual of right of action

In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.0 1-233, subsection C of §§8.0 1-245, §~ 8.01-249, 8.01-250 or other statute.

Va. Code Ann. § 8.01-247.1. Limitation on action for defamation

Every action for injury resulting from libel, slander, insulting words or defamation shall be brought within one year after the cause of action accrues.